NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4995-11T4

DARROL LEVONAS, individually,
and as the Administrator Ad
Prosequendum of the ESTATE OF
ANASTASIA PREZLOCK,

Plaintiff-Respondent,

v.

REGENCY HERITAGE NURSING AND
REHABILITATION CENTER, L.L.C.,
and DAVIS GROSS,

Defendants-Appellants,

and

ROBERT WOOD JOHNSON
UNIVERSITY HOSPITAL,

Defendant.

Argued April 30, 2013 — Decided August 29, 2013

Before Judges Harris and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7610-09.

Christopher E. Martin argued the cause for appellants (Morrison Mahoney, L.L.P., attorneys; Mr. Martin, of counsel and on the brief; Emily C. Kidder, on the brief).

Deborah R. Gough argued the cause for respondent (The Gough Law Firm, L.L.P. and Kirsch Gartenberg Howard, L.L.P., attorneys; Thomas S. Howard, on the brief).

PER CURIAM

We granted defendants Regency Heritage Nursing and Rehabilitation Center (Regency) and its owner, David Gross (collectively "defendants"), leave to appeal[1] from an interlocutory order denying their motion to dismiss the complaint of plaintiff Darrol Levonas (plaintiff), brought individually and as the administrator of the estate of his mother, Anastasia Prezlock (Prezlock), for failure to arbitrate. We find that under the "totality of circumstances" test recently articulated in Cole v. Jersey City Medical Center, ___ N.J. ___, ___ (2013) (slip op. at 20), defendants waived their right to invoke the arbitration clause by active and protracted participation in the litigation. We affirm.

We discern the following facts from the record. On September 17, 2007, Prezlock, who had been diagnosed with dementia but otherwise had been managing her own financial affairs, was admitted to Regency following hospitalization for injuries sustained from a fall.

[1] Shortly thereafter, Rule 2:2-3(a) was amended to provide that all orders compelling or denying arbitration shall be "deemed a final judgment of the court for appeal purposes."

On October 12, 2007, plaintiff signed and initialed various provisions of Regency's "Nursing Home Admission Agreement" as the "Responsible Party." Prezlock's name was written on the agreement under the heading "Resident," but she did not sign it. The agreement, which was not signed by a representative of Regency, had an arbitration provision, which included the following:

> Any claim or dispute related to or arising from this Agreement or Resident's care at the Facility (whether based or [sic] contract or tort, in law or equity) shall be resolved by mandatory, final, binding arbitration in accordance with the rules of the American Arbitration Association ("AAA"), although the parties may choose to administer the arbitration through the arbitrator instead of the AAA; provided, however, that Resident/Responsible Party shall not be entitled to an award of exemplary or punitive damages.

Prezlock remained a resident at Regency until November 15, 2008, when she was transferred to Robert Wood Johnson University Hospital (Robert Wood Johnson). Plaintiff alleges that, while a resident at Regency, Prezlock fell approximately nineteen times, sustained vertebral fractures, fractured her right hip, and suffered from dehydration, malnutrition, and infection. She died sometime prior to July 28, 2009, while a resident of Park Place Care Center (Park Place). Plaintiff contended his mother

died from injuries sustained while a resident at Regency and while admitted to Robert Wood Johnson.

Meanwhile, on February 3, 2009, Regency filed a two-count collection complaint in the Special Civil Part against Prezlock and plaintiff, as the "Responsible Party" under the admission agreement, seeking outstanding charges for services rendered.[2]

On September 9, 2009, plaintiff, individually and as administrator of his mother's estate, filed a civil complaint against defendants and Robert Wood Johnson, setting forth claims for: gross negligence; negligence; medical malpractice and professional negligence; wrongful death; and deprivation of civil rights and violations of State and federal laws protecting nursing home residents. On October 29, 2009, defendants filed an answer and asserted twenty affirmative defenses, including a defense that "[p]laintiff's claims must be dismissed as contractually they are unable to sustain jurisdiction in this court and/or arbitration is compelled."

Thereafter, Regency actively participated in the litigation. During the thirty-month interval before defendants raised the arbitration provision, the collection and wrongful

[2] Defendants maintain that at some unspecified point during the litigation they voluntarily dismissed the collection action, but the record contains no order of dismissal.

death actions were consolidated without objection by defendants, and the parties attended non-binding, private mediation and participated in case management conferences. The parties also filed numerous discovery and substantive motions, including defendants' motion to file a third-party complaint against Park Place, which was granted, and a motion for reconsideration of the court's subsequent dismissal of their complaint against Park Place, which was denied. They further engaged in extensive, court-monitored discovery, including taking the depositions of at least eighteen people, and subpoenaing the non-party deposition of the director of Park Place. Depositions of the parties' experts had not been held.

As a result of information obtained in discovery, on December 28, 2011, plaintiff filed a first amended complaint alleging that defendants provided false information and intentionally destroyed, concealed, or altered Prezlock's medical records to hide their negligence and disrupt the litigation. Plaintiff sought compensatory and punitive damages.

On March 14, 2012, more than three years after defendants filed the collection action and approximately thirty months after plaintiff filed the wrongful death action, defendants moved for summary judgment seeking dismissal of plaintiff's complaint with prejudice for failure to arbitrate. In support,

defendants noted that discovery was scheduled to end on April 10, 2012, and that a trial date had not yet been set. Defendants maintained that they had only discovered in January 2012 that plaintiff had the authority to execute the admission agreement on behalf of Prezlock, and thus, that the arbitration provision could be invoked against him. Plaintiff opposed the motion.

At the conclusion of oral argument on April 27, 2012, the trial judge issued an order denying defendants' motion. The judge found defendants had waived their right to invoke the arbitration provision because: they chose not to arbitrate the collection action which set the tone that "these matters are going to be decided in Superior Court, not in arbitration"; they "actively" and "very intensely" litigated the wrongful death action over the past two-and-a-half years; and they failed to "mention" arbitration during the various "milestones" in the litigation, including the motion to amend the complaint. The judge also considered that defendants had filed the motion "late in the . . . game," after the one-year period to request arbitration under the agreement had expired. The judge found this was "a classic waiver situation."

In the alternative, the judge determined that, even if there was no waiver, the arbitration provision would only apply

to plaintiff, individually, and not the estate. Specifically, he found that, because when Prezlock was admitted to Regency she had not been judged incompetent and no guardian had been appointed on her behalf, plaintiff did not have the authority to bind the estate to the mandatory arbitration provision.

On appeal, defendants argue that plaintiff had the authority to execute the admission agreement and to bind himself and his mother to all its provisions. According to defendants, the arbitration provision is valid and furnishes the exclusive remedy for disputes related to the agreement and the care provided by defendants. Defendants further contend that the trial judge erred in finding that they had waived their right to arbitration, especially since plaintiff had not demonstrated any prejudice by participating in the litigation.

We conduct a de novo review of a trial judge's legal determination as to whether a party waived its right to invoke an arbitration provision. Cole, supra, ___ N.J. at ___ (slip op. at 12). However, "the factual findings underlying the waiver determination are entitled to deference and are subject to review for clear error." Ibid.

We begin our analysis with the well-established principle that arbitration "is a favored means of dispute resolution." Id. at ___ (slip op. at 13) (quoting Hojnowski v. Vans Skate

Park, 187 N.J. 323, 342 (2006)). The New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, like its federal counterpart 9 U.S.C.A. § 2 of the Federal Arbitration Act ("FAA"), provides that an arbitration agreement "is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a).

Because nursing home agreements involve interstate commerce, arbitration provisions contained therein are governed by the FAA. Estate of Anna Ruszala ex rel. Mizerak v. Brookdale Living Cmtys., Inc., 415 N.J. Super. 272, 292 (App. Div. 2010). Thus, the FAA preempts the anti-arbitration provision contained in N.J.S.A. 30:13-8.1. Id. at 293. A mandatory arbitration provision in a nursing home or assisted living facility agreement is enforceable. See Marmet Health Care Ctr., Inc. v. Brown, ___ U.S. ___, ___, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42, 45 (2012) (FAA preempted state law prohibiting pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes).

However, because an arbitration agreement is a contract, even under the FAA state courts apply "the legal rules governing the construction of contracts." Cole, supra, ___ N.J. at ___ (slip op. at 13) (quoting McKeeby v. Arthur, 7 N.J. 174, 181 (1951)). As such, our Supreme Court "has recognized that

parties may waive their right to arbitrate in certain circumstances." Id. at ___ (slip op. at 13). See Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008) (a waiver will preclude enforcement of contractual arbitration provision).

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Ibid. However, "a party need not expressly state its intent to waive a right; instead, waiver can occur implicitly if 'the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference.'" Cole, supra, ___ N.J. at ___ (slip op. at 14) (quoting Knorr, supra, 178 N.J. at 177).

Recently, our Supreme Court held in Cole that

> [a]ny assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances. That assessment is, by necessity, a fact-sensitive analysis. In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's

> litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive. A court will consider an agreement to arbitrate waived, however, if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense.
>
> [Id. at ___ (slip op. at 20).]

Applying those factors here, we conclude that defendants engaged in litigation conduct that was inconsistent with their right to arbitrate the wrongful death action. Such inconsistency is particularly notable here, where defendants initiated the litigation even though, according to their reading of the agreement, their collection claims were subject to arbitration and failed to oppose the consolidation of the collection action and wrongful death suit. Although defendants asserted an arbitration defense in their answer to the wrongful death complaint, they did not otherwise provide any notification of their intent to seek arbitration. Rather, by initiating litigation, defendants sent the message that the disputes between the parties should be resolved in the judicial arena. In addition, the thirty-month delay in seeking to enforce the

arbitration provision was substantial. See id. at ___ (slip op. at 21) (finding a twenty-one-month delay to be substantial). But see Spaeth, supra, 403 N.J. Super. at 516 (the defendant asserted her right to arbitration six months after the complaint was filed and before any meaningful exchange of discovery).

Next, the parties filed numerous motions. Although defendants did not file any dispositive summary judgment motions, they filed five substantive motions, including a motion to serve a third-party complaint against Park Place and a motion for reconsideration of the order dismissing their third-party complaint. Significantly, defendants engaged in this motion practice without any indication that their litigation conduct should not be considered as a waiver of their right to arbitrate the dispute, demonstrating a continued submission to the court's authority to resolve the dispute.

With regard to their litigation strategy, defendants maintain that they did not deliberately elect to refrain from invoking arbitration earlier in the litigation. They claim to only recently have discovered in late January 2012, that plaintiff "represented himself to be, and was received by his family as the person controlling" his mother's care, and "was sanctioned and authorized to execute the subject admission agreement on behalf of Ms. Prezlock and her estate thereby

rendering the arbitration provision enforceable as to both . . . ." However, plaintiff signed the admission agreement as the "Responsible Party" in October 2007, which the explicit terms of the agreement defined as the person "acting on behalf of the Resident as his or her representative and guardian in fact . . . ." Moreover, defendants brought the collection action in 2009 against plaintiff individually and as a representative of his mother, based partially on his signing the admission agreement as the responsible party.

In any event, as a result of defendants' strategy in failing to pursue the issue of arbitration until thirty months after plaintiff filed the complaint, defendants undermined the fundamental principle of arbitration, which "is the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties." Fawzy v. Fawzy, 199 N.J. 456, 468 (2009) (quoting Barcon Assocs., Inc. v. Tri-Cnty. Asphalt Corp., 86 N.J. 179, 187 (1981)).

Finally, although a trial date had not been set at the time of the arbitration motion, the parties had engaged in extensive discovery, including producing numerous pages of medical records, conducting more than eighteen depositions, and filing several discovery motions. See Cole, supra, ___ N.J. at ___

(slip op. at 21-23) (defendant filed motion to compel arbitration three days before the scheduled trial date and after the parties had engaged in extensive discovery). Here, as in Cole, plaintiff has engaged in over two years of discovery, and if forced to arbitrate at this point, would suffer prejudice in having "to start over in a different forum under different rules." Id. at ___ (slip op. at 23). Defendants' late change of tactics has hindered plaintiff, who would face further delay and costs to resolve his case, particularly given plaintiff's allegations as to defendants' fraudulent alteration of medical records.

We conclude that, considering the totality of the circumstances of this case, defendants waived their right to arbitrate during the course of this litigation. Defendants instituted the collection suit in Superior Court, engaged in the usual litigation procedures in the wrongful death suit for more than thirty months, and only after plaintiff amended his complaint to assert claims for fraudulent alteration of medical records, moved to dismiss plaintiff's complaint by way of summary judgment for failure to arbitrate. As in Cole, supra, ___ N.J. at ___ (slip op. at 24), "[s]uch conduct undermines the fundamental principles underlying arbitration and is strongly discouraged in our state."

Because we have determined that defendants waived their right to arbitration, we need not determine whether plaintiff had the authority to bind his mother's estate to a mandatory arbitration provision. However, we express our agreement that the court, not an arbitrator, has jurisdiction to address the threshold or "gateway" question of agency. N.J.S.A. 2A:23B-6; Oxford Health Plans LLC v. Sutter, ___ U.S. ___, ___, 133 S. Ct. 2064, 2068 n.2, 186 L. Ed. 2d 113, 119 n.2 (2013) (gateway matters, such as whether parties have a valid arbitration agreement, are presumptively for courts to decide); Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 12 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007).

Affirmed.